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A WORLD TREATY OF ARBITRATION[1]

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A world treaty of obligatory arbitration is a leading feature of the program of the peace movement. It is a companion idea to a world court. It would be an instrument to obligate the nations to each other in a uniform arbitral system administered by a court. Both court and treaty are in process of development. A world court is already in existence in the form of the Permanent Court of Arbitration at The Hague. This is expected soon to have an alternative and, in time, a successor in the Court of Arbitral Justice to be established according to the Knox plan or in some other way that may be acceptable to the nations. A world treaty of obligatory arbitration is already in existence in a limited form in the Porter Convention. This applies arbitration to contractual debts. What is desired is a treaty that embraces a larger class of subjects than this one. But the term "obligatory arbitration" may need explanation. Let it alarm nobody. It signifies only a moral obligation to arbitrate. No penalty for refusal to do so is provided. No other international authority than public opinion as yet stands behind the Hague conventions to enforce them.

The nineteenth century prepared the way for the desired measure. The arbitration treaties of that period were at first made with reference to disputes that had occurred in the past, but from

[1] This is the first of a series of seven articles by the same author on subjects of present interest in International Law, which will appear in the JOURNAL during the present calendar year.

the treaty of Guadalupe Hidalgo, February 2, 1848, between Mexico and the United States, arbitration treaties began to be made to provide for the adjudication of disputes arising in the future. Between 1862 and 1898 fifty-seven treaties, chiefly of peace, amity, commerce, and navigation, were furnished with clauses providing for the reference of future disputes to arbitration. Of these, Italy was a party to nineteen, Belgium to eleven, Switzerland to eight, Norway to six, Sweden to five, Siam to five, and Great Britain to four. In 1885 the fifteen powers that met in the Berlin Congress made a provision for the arbitration of Congo questions. Resolutions introduced in the United States Congress from 1851 on and in the British Parliament in 1849 and 1873 show that both these countries desired to establish a general arbitration system with other nations. The Pan-American Conference held in Washington in 1889-90 provided for a general arbitration system between the American Republics, but its plan was unratified.

As a result of the movement for arbitration in the nineteenth century an attempt was made at the First Hague Conference to incorporate into its Convention for the Pacific Settlement of International Disputes a universal system of obligatory arbitration. But, owing to the opposition of Germany, arbitration, though approved as a theory, was left on a voluntary basis. The articles accepted were declaratory of opinion, but without legal effect. The Permanent Court of Arbitration was established, but this also, owing to Germany's opposition, was put on a voluntary basis. Provision was made, however, that the nations might, if they desired, make arbitration treaties among themselves "with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it."

But the provision for the court and for separate arbitration treaties, though not going as far as some nations wanted to go, accelerated the cause of arbitration. By 1907, thirty-three treaties had been made and ratified by pairs of nations, by which they agreed to refer their more difficult cases to arbitration tribunals or to the Hague Court with certain classified exceptions. Denmark and the Netherlands, and Denmark and Italy, had agreed to refer all their disputes whatsoever to arbitration. The cause also moved on in other ways. Eight of the Pan-American countries, including the United States, at their Conferences of 1901-1902, and 1906, had agreed to submit to arbitration all claims

for pecuniary loss or damage, provided they were of sufficient value to be worth the submission and could not be settled by diplomacy. The Pan-American Conference of 1906 also recommended the nations represented in it to instruct their delegates to the Second Hague Conference to secure the negotiation of a world treaty of arbitration. Then came the question. There are forty-seven nations in the international family. It was seen that if the process of making separate treaties by them in pairs, which had become a custom, should continue until every nation had a treaty with all the others, there would have to be more than 1,000 treaties. Such a process, if carried to conclusion, would involve a vast amount of negotiation extending perhaps over years and might well have seemed unnecessary when the nations had begun to meet in Hague Conferences to discuss questions of their mutual concern.

To the government at Washington a single world treaty instead of so many separate instruments appeared to be a reasonable solution of the problem. It, therefore, proposed a slightly modified form of the Anglo-French treaty of 1903, which is the basis of most of the arbitration treaties made by the nations in pairs. This is the first and fundamental article of the American proposition:

"Differences of a legal nature and, primarily, those relating to the interpretation of treaties existing between two or more of the contracting nations, which may arise between them in the future and which cannot be settled by diplomatic means, shall be submitted to arbitration, on condition, however, that they do not involve the vital interests, independence, or honor of either of the said nations, and that they do not affect the interests of other nations not concerned in the dispute."

It was left optional with the Signatory Powers to decide for themselves whether a given dispute involved their vital interests, honor or independence and could legally be excepted from obligatory arbitration.

The discussion of the measure in its preliminary stages resulted in the adoption of an amendment containing a list of questions that should be arbitrated unconditionally or to which the plea of vital interests, national honor or independence should not apply. This list is as follows:

I. Disputes concerning the interpretation and application of conventional stipulations relative to the following matters:

1. Reciprocal gratuitous aid to the indigent sick.
2. International protection of workingmen.
3. Means of preventing collisions at sea.
4. Weights and measures.
5. Measurement of vessels.
6. Wages and estates of deceased sailors.
7. Protection of literary and artistic works.

II. Pecuniary claims on account of injuries, when the principle of indemnity is recognized by the parties.

This list was the suggestion of Portugal principally, but it had the support of Sweden and Servia. Servia would have preferred the list to the general formula first offered by the American delegation. The proposition was also otherwise modified by Great Britain, so that by an added protocol a list of new questions, susceptible also of arbitration, might be inserted by any power that might desire to arbitrate them. Thus it might be possible for the great majority of nations by a single act to adopt a mild but uniform system of arbitration and for others to advance to new fields of legal settlement at their own free will. Anybody at any time could refer to the register of the nations at The Hague and ascertain what questions each nation was pledged to arbitrate. The proposition also provided that in case of a dispute adjudicated between certain nations, other nations or, indeed, all the nations if they chose, might accept the award, provided it related to the interpretation of a convention in which they were concerned; otherwise the award was to be restricted to the original parties at variance. If the adjudication related to the interpretation of a convention which established a union of nations, all the nations of the union might, if they desired, accept the decision, a certified copy of which should at all events be transmitted to them whether they had taken part in the suit or not.

This proposition as finally offered by the United States delegation is sometimes cited as the American-British-Portuguese plan in order to indicate that it combined the ideas of the three nations among which it originated. It was intended to be an integral part of the Convention for the Pacific Settlement of International Disputes and was to be articled and numbered in its proper place. During the discussion, however, at the suggestion of M. Nelidow, President of the Conference, an understand-

ing was reached that if adopted the treaty should be made a separate convention. The plan was not adopted. It was defeated by a vote of nine to thirty-two, with three abstentions. The nations opposed were Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Montenegro, Roumania, Switzerland and Turkey. Those abstaining were Italy, Japan and Luxemburg. Under the rule that nothing should pass the Conference unless with a unanimous vote, "or nearly so," whatever the latter indeterminate phrase may mean, this great measure towards which the world had been working for half a century, though it had a majority of three-fourths of the nations voting, was defeated, as Mr. Choate pointed out, by a minority that could be counted on one's fingers.

The result of this vote was disappointing not only to the United States, but to many other nations, among them Italy, which was famous in the latter part of the nineteenth century for its belief in arbitration. But Italy, like Austria, a member of the Triple Alliance, is supposed to have been influenced by Germany, the principal opponent of the measure. However, after various attempts at conciliation and compromise had failed, Count Tornielli, of Italy, offered a resolution in which the Conference unanimously admitted that "certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration without any restriction." This vote put the family of nations on record for obligatory arbitration in principle, and was an important step forward as compared with that taken in 1899, when arbitration was in theory left voluntary; and the fact that Germany voted for it is a good sign of hope for a change in German opinion in the future. Four nations, however, abstained from voting on this measure, the United States, Hayti, Japan and Turkey. The United States delegation abstained not because the declaration was undesirable in itself, but because it fell short of the high ideal it proposed, which was arbitration in concrete treaty form instead of an expression of sentiment in a resolution. But besides passing this resolution the nations at the Second Hague Conference separated the question of contractual debts, already referred to, from other questions susceptible of arbitration and made what is known as the Porter Convention, popularly so named for General Horace Porter of the American delegation who drafted it. This, taken together with the resolution, is also significant for the future success of a single universal treaty of

large scope. Besides this, the Central American republics made in Washington, two months after the Hague Conference adjourned, a treaty by which they agreed to refer all their disputes to arbitration; while the United States, during the remainder of the Secretaryship of Mr. Root, negotiated twenty-four treaties of arbitration on the lines of the Anglo-French treaty of 1903, upon which its proposition at The Hague was based. There are now about 100 treaties of arbitration by the nations in pairs. So far have we advanced in the evolution of the desired system.

We now come to the consideration of the causes for the defeat of the general world treaty at the Second Hague Conference. In the first place, due allowance must be made for the rule that every measure of importance must have a unanimous vote, or nearly so, to secure its passage. This rule, as pointed out in the writer's article in the January, 1910, *Yale Law Journal,* on the Court of Arbitral Justice, is due to the fact that the Hague Conference is not representative like an ordinary legislative assembly, which is composed of delegates from one nation, but is a diplomatic meeting of sovereign states. These states are more or less jealous of each other and of their own independence and none of them likes to yield to the voice of a majority or will be coerced, if it can help it, by anything except superior force. The result is that, for the sake of unanimity, much of the legislation made at Hague Conferences is in the nature of compromises. The rule has its good and its bad side. A measure that is adopted by all the nations is likely to stand longer than one that has only a bare majority in its favor. If a bare majority vote should rule, there might be no important measures proposed, or possibly there would be a division of world interests into groups, Pan-American or European, or otherwise, and the Hague Conferences would break up. But the evil of the present system is that a small minority of nations can hinder by their dissension the progress of the many that are ready to act as a whole. Had it not been for this rule of unanimity, the opposition of Germany would have been insufficient to prevent the adoption of a world treaty of arbitration. This limitation will doubtless be overcome with the development of world federation, and must be removed before there can be a real Congress of Nations, though the majority may have to be fixed at two-thirds or some large proportion in order to secure the stability of the international state.

The opposition to the world treaty was led by Baron Marschall von Bieberstein, the first delegate of Germany, a brilliant diplomatist, who was assisted by Dr. Kriege, a man distinguished for his controversial ability as well as his knowledge of public law. Marshall von Bieberstein's speeches, which were taken as the best expression of the opposition, were answered, however, by Mr. Choate, Dr. Scott, Sir Edward Fry and Professor Renault at the Conference and have since been answered by Dr. Henry Lammasch, the distinguished President of the Fisheries tribunal, in an article in "Staatslexicon," which was republished in the *American Journal of International Law, January,* 1910. These men have replied to the German delegates with so much force that they have left little ground for the opposition of the future to stand on. This fact considered in connection with the growth of the number of arbitration treaties, and with the other facts already accomplished, is encouraging.

To the first article of the proposition for a world treaty, which was the original American plan, objections were made by Germany that the reservations of vital interests and national honor were too broad and were, therefore, a sham, as any proposal to arbitrate might be refused in their name. But it may be that Germany took this part of the plan too seriously. The necessity for reserving questions of honor, a conservative provision, is passing. Half a century ago, when the Alabama case came up, Lord John Russell claimed that the British government, and not foreign arbitrators, were the "sole guardians" of Her British Majesty's honor; but, on more mature reflection, the government decided to arbitrate the dispute: Germany and France revealed the strength of world sentiment as it is to-day when they decided to arbitrate the Casablanca incident, which was a case affecting their national honor. When President Taft said that he did not see why questions of honor could not be arbitrated like any others his position was widely approved. And the same thing is practically true of the phrase "vital interests"; it means less than it seems to mean, though it is undefined. Vital interests were not invoked to prevent the Fisheries arbitration, in which Great Britain and the United States have taken part; nor the North Sea inquiry, with which Great Britain and Russia were concerned; nor the Venezuelan arbitration, in which Germany itself was one of the parties, though vital interests of the countries concerned were affected. But if the reservations are so important that their presence in a

treaty of arbitration makes it a sham, why did not Germany protest against their use in treaties that it made with Great Britain and the United States after the adoption of the Hague Court and before 1907? See, for example, one of the Hay treaties, which the Senate of the United States refused to ratify on other grounds. The sham, therefore, if there be such, is insistence in thinking that these phrases mean all they appear to mean, and sometime they will be left out of the proposition for a world treaty of obligatory arbitration altogether, as they were left out of the treaties of Denmark and the Netherlands and Denmark and Italy. What is needed much more than these reservations is that mutual pledges shall be made that no nation shall take territory from another nation by conquest, and that the greatest possible security shall be given against infringement by one nation upon another's sovereignty. An examination into the objections of Germany, from the point of view of these clauses, only shows what a conservative measure was proposed by the United States and makes the world wonder why it could not pass.

Objection was also made that the article did not distinguish clearly between legal and political questions, that what might be a legal question in one country might, owing to a different viewpoint, be regarded as a political question in another. But here the reservations of vital interests and national honor may have some value other than that of their conservatism. They make it possible for a sensitive nation to say that the question under discussion is a political question because it affects its vital interests and national honor, and, therefore, it cannot arbitrate it. The list of reservations, then, so far makes a practical distinction; but, as Professor Lammasch points out, the phrase, "questions of a legal nature" could be omitted, and the expression "interpretation and application of treaty stipulations" be allowed to remain. By the term "questions of a legal nature," however, emphasis is given to the propriety of adjudicating a class of questions which of all questions ought to be settled by law instead of force.

The efforts of the defenders of the treaty, who had finally accepted the amendment offered by Portugal, gradually centered in the list of cases suitable for arbitration rather than on the general formula already discussed. This was due to a mistaken impression that, though Germany disapproved the American formula, it looked with favor on a list of arbitrable questions, but nothing in the list was acceptable to Germany. Its first delegate

declared that the subjects on it were unimportant and he instanced what was perhaps the least likely subject of controversy, the admeasurement of vessels. But the list corresponded to that which had been made by the Interparliamentary Union at London. Besides, it gave the International Court that which had long been desired, a definite jurisdiction instead of the comparatively vague range of questions that are termed "legal" or that relate to treaty stipulations, though the latter, of course, are more definite than the former. If all questions cannot be arbitrated it is a distinct advantage to know what classes of them may be. This fact has already been appreciated by some nations, as may be seen by reference to a treaty between Mexico and Spain in 1902, and to the conventions adopted at the Pan-American Conferences of 1901-1902 and 1906, in which lists of arbitrable questions are given. The list offered by the Hague Conference was not intended to be final, but only a minimum to which, according to the British amendment, any nation might add more serious questions that it desired to arbitrate. Could there be a safer proposition for the normal development of arbitration? Great Britain deserves honor for its farsighted suggestion. Finally, the acceptance of a list as well as the treaty as a whole would have made arbitration in the eyes of the family of nations the natural means for the settlement of international difficulties and war would, in effect, be regarded as the abnormal way. Arbitration would have had to be considered first and for sufficient reasons rejected, before resort could be had to war. It is unfortunate that the opposition could not see the moral value of the plan proposed.

Then, there were objections to the world treaty in itself. These may be summarized and answered thus:

It was stated that unpopular or inconsistent interpretations of an article in a convention might, if pressed, break up a union of nations, like the Postal Union. But the fact that the nations composing the unions are widely separated and, therefore, may differ widely in their interpretations of a given article is all the more reason why an authoritative interpretation by an International Court should be desired. Arbitration would, under such conditions, tend to strengthen rather than weaken the unions by securing uniformity instead of leaving matters irregular. It was objected that arbitration of an adjudicated case between citizens of two nations, one of whom was dissatisfied with it, would infringe upon the jurisdiction of national courts and deprive the

other person of his right to be tried by his own judge. This, as Professor Lammasch points out, would be true in form of an already settled case referred to an arbitration court where there was no standing treaty of arbitration providing for the reference of classes of cases to which the given case belonged. But, if such references were regularly agreed upon by treaty and approved by the national legislature beforehand, the jurisdiction of the national court would not be impaired nor would the right of a person to be tried by his own judge be denied him, as the arbitration court in such case would be quite as much the citizen's court as his national court, for it would be a constituent part of his nation's legal system. It was feared that an objectionable interpretation given by a court of arbitration would fail to be carried out by the executive officers of a country against which it was decreed. But Article 37 of the Convention for the Pacific Settlement of International Disputes, to which all nations, including Germany, are agreed, lays down the rule that "recurrence to arbitration implies an engagement to submit in good faith to the award." If that rule should seem insufficient an agreement to accept the interpretation of the court might be made in the protocol under which an arbitration is entered upon. There is no good ground for fearing refusal to comply with an arbitral decree. History shows that arbitral awards have been accepted save in a few instances and that these, when protested, have been referred to a new court, as in the Orinoco Steamship case, to the Hague Court, for irreconciliable differences of opinion have been settled by a new negotiation. But if inconsistent interpretations should be made by the International Court, they could be corrected by later decisions according to the custom of national courts. Therefore, there is no reason from the standpoint of court decisions, why the adoption of a world treaty of obligatory arbitration is impracticable.

Doubt was expressed that if the world treaty were adopted, national legislation would be forthcoming to support arbitral decisions made under it. But nations make legislation to enforce treaties of war and peace. Austria, one of the opponents of the world treaty, is an example of a nation that changed its legislation to conform to an international decision when the Brussels Sugar Commission called the attention of that state to the fact that its laws were in conflict with the Brussels Sugar Convention. Mention has already been made of Article 37 for the Pacific Set-

tlement of International Disputes which provides that nations shall keep good faith in the matter of arbitral decisions. The Red Cross Convention of 1906 stipulates that the various national governments shall be advised to enact legislation to restrict the Red Cross symbol to Red Cross purposes. It has frequently been used in business advertisements and otherwise to the confusion and detriment of the Red Cross idea. The nations were also pledged by this convention to recommend legislation, if their penal laws were deficient, to suppress individual acts of robbery and ill-treatment of wounded men in time of war. Article 9 of the draft for the International Prize Court says: "The contracting powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay." This would seem to imply the obligation to create legislation if it were necessary. Both these conventions were signed by Germany and, so far as we know, without protest against the particular provision cited. Germany evidently thought they would be carried out in good faith.

One article of the world treaty allowed the *compromis,* that is, the preliminary arrangements—the statement of the issues and the conditions—which are adopted for every case of arbitration, to be made in accordance with the constitution of such countries as require the consent of more than one branch of the government to a treaty. This provision protected the United States, the Senate of which insists that its consent must be given to the *compromis* made by the President with other governments preparatory to an arbitration. It will be remembered that it was only with that understanding that the withheld Hay arbitration treaties could be granted the approval of the Senate. The provision was criticised by Germany on the ground that a treaty made between a country having undivided national authority and another having two branches, one requiring the other's consent, would, if the consent were refused, be binding upon the former, but not upon the latter. But nations are entities in their relations with each other and if their executive governments are divided into two parts, like the President and Senate of the United States, for the purpose of making treaties, that is purely a matter of national concern. A treaty made by Germany with the President of the United States alone would have binding force on neither country. Austria-Hungary, since the Conference, has made a treaty with the United States in which the same kind of *compromis* that oc-

curred in the world treaty of arbitration was adopted. This permits reference to the Senate. This fact should be instructive to Germany, especially as Austria stood with Germany in its opposition, and is another sign of progress with the idea of a world treaty.

But no consideration of the opposition of Germany would be complete that was confined to the refutation of arguments alone. The distrust shown by Germany was not so much of arbitration as of some of its sister states to which it would have to obligate itself if it participated in a world treaty. It became evident during the Conference that Germany wished to choose its own company on the basis of advanced legal development. With certain states that had highly developed judicial systems it would make treaties, but with those of poorly developed systems it did not care to bind itself. It preferred to be in a position to settle things with the latter class of countries by force. But Mr. Choate, in his keen analysis of the situation, made a suitable reply: "The whole matter is one of mutual confidence and good faith. There is no other sanction for the execution of treaties. If we have not confidence one with another, why are we here?" Germany must learn to put more faith in the less developed nations.

Germany's final word of consolation, out of accord with half a century's development of arbitration and with growing public sentiment, as expressed in the vote of 32 nations at the Second Hague Conference—a three-fourths majority of those voting—was that the question of a world treaty was unripe for action, but that the system of making treaties in pairs had better continue until, as in the case of Denmark and the Netherlands, and Denmark and Italy, it should develop into something better than the mild form of treaty that was then proposed.

But Germany was inconsistent in its objections. Although it refused to adopt arbitration in a universal treaty, it stood for arbitration in principle. It enthusiastically welcomed the coming of the "empire of law," such was the soul-thrilling and hope-creating phrase used by Marshall von Bieberstein when he referred to the World Court of Arbitral Justice for which Germany was one of the sponsors, and to the operation of which a world treaty of arbitration might fairly be expected to be a desirable adjunct. Germany, too, would have accepted a Court of Review for cases in private international law. This would have meant renunciation of national sovereignty quite as much as the world treaty

of arbitration. Of like effect will be the draft, when ratified, of the International Prize Court which Germany presented, for it provides for the judgment of the acts of a national naval officer by an international tribunal. Germany, furthermore, accepted the Porter Convention, but on the ground that it did not establish compulsory arbitration, which, however, we are all constrained to believe was the very thing that it embodied. These inconsistencies were seen at the time and some of them were pointed out by Mr. Choate. But neither his strong arguments, nor the light which Professor Renault threw upon the legal problems that the German delegates raised, proved availing against the opposition of Germany.

But a world treaty of arbitration is what the world wants and what the world will have. It only remains for the friends of peace to keep up an earnest agitation in behalf of the treaty from now on to the Third Hague Conference. This agitation should be carried on in all the states from Greece to Japan that abstained from voting for or that voted against the treaty. But Germany should be labored with most of all, as her influence against the treaty was paramount in 1907, particularly with her Italian and Austria-Hungarian allies, which may again be inclined to hold together with Germany against the measure. Nations like the United States, Great Britain, Russia and France which believed in the treaty ought to bring their influence to bear upon the statesmen of the German Foreign Office. Popular agitation should be organized in Germany by believers in the proposed treaty. When the German people realize the responsibility of their government for the failure of the world arbitration treaty at the Second Hague Conference they may be depended upon to work a change of opinion in their government. When the German nation, that great nation of scholars and thinkers, our good friends, sees that the world has at last heard the message of its own great Kant's "Eternal Peace," representative government being adopted everywhere and the world parliament in its inception through the Conferences at The Hague, waiting only for Germany to join in a universal system of arbitration to make the "empire of law" a reality, it will rise to its imperial duty, and, instead of restraining, will lead the forces of international peace.

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